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UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF CALIFORNIA

SONNY LOW et al., on Behalf of Themselves and All Others Similarly Situated,

Plaintiffs,

v.

TRUMP UNIVERSITY, LLC et al.,

Defendants.

Case No. 10-CV-0940-GPC(WVG)

CLASS ACTION

DEFENDANTS TRUMP UNIVERSITY'S AND DONALD J. TRUMP'S NOTICE OF MOTION AND MOTION FOR LEAVE TO FILE RENEWED MOTION FOR DECERTIFICATION

[MOTION FOR DECERTIFICATION; MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION FOR DECERTIFICATION; DECLARATIONS OF DAVID KIRMAN AND MARK COVAIS]

Hearing: July 22, 2016
Time: 1:30 p.m.
Courtroom: 2d
Judge: Hon. Gonzalo P. Curiel

TO THE COURT, ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE THAT defendants Trump University, LLC and Donald J. Trump ("defendants"), by and through their counsel of record, will and hereby do move the Court for an order granting them leave to file the attached motion to decertify the class (the "Motion").

The Motion is made on the grounds that: (1) class certification is inherently tentative and the Court is under an ongoing duty to reexamine the viability of class certification under Rule 23 of the Federal Rules of Civil Procedure when facts or circumstances render the case inappropriate for class treatment; (2) the facts and circumstances of this case have changed since defendants filed their motion for decertification on February 19, 2015, which this Court granted in part on September 18, 2015; and (3) such changed circumstances, as well as binding Ninth Circuit authority, necessitate that the Court reexamine its certification decision and decertify the case in its entirety.

The Motion is based upon this Notice of Motion and Motion, the attached Motion for Decertification and the Memorandum of Points and Authorities attached thereto, and the Declarations of David Kirman and Mark Covais in support of defendants' Motion for Decertification.

I. THE COURT MUST GRANT LEAVE TO FILE THE MOTION FOR DECERTIFICATION.

Under Rule 23, "the district court is charged with the duty to monitor[] its class decisions in light of the evidentiary developments of the case." *NEI Contracting & Eng'g, Inc. v. Hanson Aggregates, Inc.*, 2016 WL 2610107, at *6 (S.D. Cal. May 6, 2016). An order granting class certification is "inherently tentative," *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978), and the Court therefore "may decertify a class at any time," Fed. R. Civ. P. 23(c)(1)(C); *see Rodriguez v. W. Publ'g Corp.*, 563 F.3d 948, 966 (9th Cir. 2009).

As a court in this district recently observed, "[t]he district judge *must* . . . decertify as appropriate in response to the progression of the case from assertion to facts." *Hanson Aggregates*, 2016 WL 2610107, at *6 (emphasis added); *accord Weinman v. Fid. Capital Appreciation Fund (In re Integra Realty Res., Inc.)*, 354 F.3d 1246, 1261 (10th Cir. 2004) ("Moreover, a trial court overseeing a class action retains the ability to monitor the appropriateness of class certification throughout the proceedings and to modify or decertify a class at any time before final judgment."); *Boucher v. Syracuse Univ.*, 164 F.3d 113, 118 (2d Cir. 1999) ("But under Rule 23(c)(1), courts are required to reassess their class rulings as the case develops." (citations and quotations omitted)); *Barnes v. Am. Tobacco Co.*, 161 F. 3d 127, 134 n.4 (3d Cir. 1998) ("District courts are required to reassess their class rulings regularly as the case develops."); *E. Me. Baptist Church v. Union Planters Bank, N.A.*, 244 F.R.D. 538, 540 (E.D. Mo. 2007) ("The Court has an ongoing duty to assure that the class claims in this action are certifiable under Federal Rule 23 . . . . This duty continues even after class certification.").

Defendants can move for decertification at any time, including after discovery, during trial, or even after trial. *Whiteway v. Fedex Kinkos Office & Print Servs., Inc.*, 2009 WL 9523749, at *3 (N.D. Cal. Oct. 2, 2009) (decertifying class after discovery revealed that the "individual workplace experiences of each [plaintiff] must be assessed in order to" resolve liability); *Garvey v. Kmart Corp.*, 2012 WL 6599534, at *2 (N.D. Cal. Dec. 18, 2012) (renewing motion to decertify at trial); *Arredondo v. Delano Farms Co.*, 301 F.R.D. 493, 499 (E.D. Cal. 2014) (defendants moved for decertification after bench trial); *see also In re Urethane Antitrust Litig.*, 768 F.3d 1245, 1252 (10th Cir. 2014) (renewed motion for decertification after trial).

Defendants anticipate plaintiffs will argue that the "good cause" standard of Rule 16 applies to this Motion because defendants seek to file their motion for decertification after the motions deadline. Plaintiffs are wrong for two reasons.

First, Rule 16 does not affect the Court's ability to consider a motion for decertification under Rule 23(c)(1)(C), which may be brought *anytime*. *Rosales v. El Rancho Farms*, 2014 WL 321159, at *4 (E.D. Cal. Jan. 29, 2014) ("However, because the Court can consider a motion for decertification under Fed. R. Civ. P. 23(c)(1)(C) to alter or amend a class certification before final judgment, whether the scheduling order should be amended is irrelevant."), *report and recommendation adopted*, 2014 WL 631586 (E.D. Cal. Feb. 18, 2014); *see Negrete v. Allianz Life Ins. Co. of N. Am.*, 2013 WL 3353852, at *2–4 (C.D. Cal. Jul. 3, 2013) (reexamining class certification even though defendants did not meet "good cause" diligence requirement because under Rule 23, a district court may decertify a class at any time).

Second, as set forth more fully in the motion to decertify the class filed concurrently with this Motion, the changed circumstances in this case necessitate reexamination of the Court's prior certification holding. Since defendants filed their first motion for decertification, the parties have conducted 28 depositions—including four former TU students and California class representative Sonny Low—exchanged expert disclosures and conducted expert discovery, exchanged over 100,000 pages of documents, and exchanged proposed trial plans.

The new evidence directly bears on whether this case can continue as a class action. For example, the evidence establishes that the alleged core misrepresentations at issue were not *uniformly* made to the class. Rather, TU students were exposed to different TU marketing, distinct advertisements (some contained the alleged misrepresentations, while others did not), and oral representations from individual TU employees. Decertification is required on this basis alone. *See In re First Am. Home Buyers Prot. Corp. Class Action Litig.*, 2016 WL 695567, at *24 (S.D. Cal. Feb. 22, 2016) ("Common issues do not predominate where there is 'no cohesion among the [class] members because they were exposed to quite disparate information from various representatives of defendant.'")

(quoting *Stearns v. Ticketmaster Corp.*, 655 F.3d 1013, 1020 (9th Cir. 2011)); *see also Cohen v. Implant Innovations, Inc.*, 259 F.R.D. 617, 628 (S.D. Fla. 2008) ("Whether each putative class member actually received Defendant's marketing materials is an individual question of fact critical to each member's claim.").

The new evidence also shows that students attended TU for different reasons, relied on TU's marketing (if at all) in vastly different ways, and were exposed to varying interactions with *individual TU employees* before attending live events. It also demonstrates that issues of reliance, causation, and materiality are not susceptible to class-wide proof. *See Mazza v. Am. Honda Motor Co.*, 666 F.3d 581, 596 (9th Cir. 2012) ("[C]ommon questions of fact do not predominate where an individualized case must be made for each member showing reliance"); *In re ConAgra Foods, Inc.*, 302 F.R.D. 537, 576–77 (C.D. Cal. 2014) (The "Ninth Circuit has held that if a misrepresentation is not material as to all class members, the issue of reliance 'var[ies] from consumer to consumer,' and no classwide inference arises.").

Plaintiffs' strategic decisions also support the need for decertification. In addition to withdrawing Tarla Makaeff, the former lead California class representative, from this case, plaintiffs have abandoned one of their three core misrepresentations—namely, whether defendants misrepresented that "students would receive one year of expert support and mentoring." *See* Dkt. 466 at 6 n.3. Plaintiffs extensively relied upon this alleged misrepresentation in obtaining certification of the class, opposing decertification, and supporting the "full refund" damages model.

Lastly, as highlighted by new authority in this district, certification must also be examined again because, at plaintiffs' urging, the Court committed error in relying on cases under the FTC Act to justify plaintiffs' "full-refund" theory of restitution and damages. *See First Am.*, 2016 WL 695567, at *23 ("[T]he Ninth Circuit has declined to apply the FTC standard to consumer actions 'in the absence

of a clear holding from the California Supreme Court' that it should be applied." (citation omitted)); *Lozano v. AT&T Wireless Servs., Inc.*, 504 F.3d 718, 736 (9th Cir. 2007) ("[I]n the absence of *a clear holding* from the California Supreme Court," it is impermissible to assume that the FTC Act applies to state law consumer claims.) (emphasis added)); *Jones v. ConAgra Foods, Inc.*, 2014 WL 2702726, at *19 (N.D. Cal. Jun. 13, 2014) ("There is no reason to import the remedies from the FTC Act into a California UCL or FAL case, and Plaintiffs point to no authority that does so."); *see also Joe Hand Promotions, Inc. v. Bragg*, 2016 U.S. Dist. LEXIS 24752, at *16 (S.D. Cal. Feb. 29, 2016).

Based on these material changes to both the facts and legal theories underlying this case, the Court must grant defendants' Motion and reexamine its certification ruling. *See Dalton v. Lee Publ'ns, Inc.*, 2013 WL 2181219, at *1 (S.D. Cal. May 20, 2013) (Curiel, J.) (noting that "leave to file a renewed motion to decertify the class" was proper "based on the premise that Plaintiffs were unable to present common evidence at trial"); *see also Westways World Travel, Inc. v. AMR Corp.*, 265 F. App'x 472, 475–76 (9th Cir. 2008) ("If later evidence disproves Plaintiffs' contentions that common issues predominate, the district court can at that stage modify or decertify the class"); *Marlo v. United Parcel Serv., Inc.*, 251 F.R.D. 476, 488 (C.D. Cal. 2008) (courts will decertify a class if later revelations in the form of discovery, motion practice, or trial preparation reveal that any of the requirements of Rule 23 is not satisfied).

II. CONCLUSION

For the foregoing reasons, and for the reasons set forth more fully in the attached motion for decertification, defendants respectfully request that the Court grant their Motion for Leave to File their Renewed Motion for Decertification.

Dated: June 3, 2016

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